No. 22,708

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

STADIUM APARTMENTS, INC., ET AL.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

BRIEF FOR AMICUS CURIAE--STATE OF IDAHO AND STATE OF WASHINGTON

STATE OF WASHINGTON
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STATEMENT OF THE CASE

I.

Nature of the Case

This case involves an appeal by the United States from a decree ntered against the Appellee and in favor of the United States, as ssignee of a mortgagee, in which the United States District Court

of Idaho, Southern Division, provided for a one-year period of redemption, after foreclosure sale, pursuant to the law of the State of Idaho. (Rptr's. Tr. pp. 22-24 and R. p.71) The decree was entered by default, the Appellee making no appearance in the trial court and the Appellee has not filed a brief in this appeal.

Although generally obtaining the relief sought in the trial court, the United States bases its appeal upon alleged error by the court below in incorporating within its decree a provision allowing the Appellee a period of one year after the Marshall's sale in which to redeem the mortgage, basing that provision upon an Idaho statute allowing a one-year period for redemption of mortgages. I.C. Sec. 11-402.

II.

Statement of Facts

On November 30, 1949, Stadium Apartments, Inc., executed a mortgage as mortgagor with Prudential Insurance Company of America as mortgagee. This mortgage was insured by the Federal Housing Administration. (Rptr's. Tr. p.3 and R. pp. 8-16) Following assignment of the mortgage by Prudential to the United States, and following default by the mortgagor, the United States commenced an action to foreclose the mortgage. A decree of foreclosure by default was obtained by the United States against Stadium Apartments, Inc.

At no time in this case, either in the trial court or before this court on appeal, has an appearance been made by Stadium Apartments, Inc., nor by any other named Defendant.

ARGUMENT

As amicus curiae, it is our duty to assist this court in disposing of this appeal. In discharging this duty, we respectfully submit that this cause is in the nature of an ex parte appeal, in which no real controversy exists, upon points of law which are moot and which, if they are to be determined at all, should be decided in a contested proceeding between two adverse parties. Any alleged errors by the trial court in its application of the one-year period of redemption are harmless errors because it does not appear from the record how the United States was harmed thereby. It is provided in 28 U.S.C. Sec. 2111 as follows:

> "On hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to error or defects which do not affect the substantial rights of the parties."

Harmless error in Conclusions of Law entered by the trial judge will not justify reversal of the judgment below. In Land O'Lakes Creameries, Inc., v. Commodity Credit Corporation, 308 F.2d 704 (8th Cir. 1962), the parties had agreed in their sales contract to arbitration by the Contract Disputes Board of Commodity Credit.

Appellant urged that the District Judge erred in considering legal doctrine not presented before the Contract Disputes Board. On appeal, the Court of Appeals for the Eighth Circuit said:

> "By its Conclusion of Law No. VI the District Court did not change modify or vary the amount of CCC's damages as found and determined by the Contract Disputes Board. In the statement of that conclusion it is clear that the District Court did not sustain the decision of the Contract Disputes Board 'on a different legal doctrine' than that used by the Agency in ascertainment of the correct amount of damages allowed to CCC. * * * But if there was any error committed by the District Court in its statement of Conclusion of Law No. VI supra, it could be no more than harmless error and such error would not warrant any reversal of the judgment in this case. Rule 61, F.R. Civ. P., Title 28 U.S.C.A." (emphasis added)

This court and various other circuits have uniformly held that no opinion will be delivered where no real controversy exists, where the appeal is moot and where no point of law or fact is in controversy, the determination of which would be helpful in a subsequent case. Pacific Inter-Club Yacht Assn. v. Morris, 288 F.2d 886 (9th Cir. 1961); Wheeldin v. Wheeler, 280 F.2d 293 (9th Cir. 1960); Dunn v. Werner, 93 U.S.App.D.C. 363, 210 F.2d 730 (1954); Signallite Fuse Co. v. Fuse Indicator Corp. 174 F.2d 819 (3rd Cir. 1949).

Where the course of events following judgment by the trial court and prior to argument on appeal renders the appeal moot because the appellant cannot obtain relief from the Appellate Court, the

appeal will be dismissed. Such an intervening event was present in both the case at bar and in the case of Fink v. Continental Foundry & Machine Co., 240 F2d 369 (7th Cir. 1957). In that case the District Court denied the injunctive relief sought by minority shareholders of Continental Foundry and dismissed the case on the merits. Plaintiffs had sought to enjoin the directors and officers of Continental Foundry from selling the corporate assets to Blaw-Knox Company, thereby liquidating Continental Foundry. On the same day on which the District Court denied the injunction, defendant directors, pursuant to contract, liquidated Continental Foundry and sold its assets to Blaw-Knox.

In delivering the opinion of the court, holding the appeal to be moot, Judge Wham stated as follows:

> "The general law, as well as the law in this circuit, has long been established that if pending an appeal an event occurs which renders it impossible for the appellate court to grant any relief or renders a decision unnecessary the appeal will be dismissed. Selected Products Corporation v. Humphries,[1] supra, citing many cases. The court went on to say (86 F.2d 823): 'There must be an actual controversy; an appeal will not be entertained to determine moot questions, and it will be dismissed, therefore,if by act of the parties or otherwise the circumstances have so changed that is is impossible or unnecessary for the

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[1] Selected Products Corporation v. Humphries, 86 F.2d 821 (7th Cir. 1936).

> appellate court to grant relief.' Among the cases that were cited in support of the above principle is American Book Co. v. State of Kansas, 193 U.S. 49, 24 S.Ct. 394, 48 L.Ed. 613, which, in turn, cited Mills v. Green, 159 U.S. 651, 16 S.Ct. 132, 133, 40 L.Ed. 293, where the court said: 'The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from a lower court, and without fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.'" (emphasis added)

The course of events between judgment and appeal in the Fink case and in the case at bar are analogous. In the former, corporate assets were sold to a purchaser following a dismissal of an action seeking an injunction against such a sale. When the matter reached the Court of Appeals, that court was faced with a fait accompli, the act sought to be enjoined had already been committed and relief was impossible. In the case at bar the United States District Court for the District of Idaho entered a foreclosure decree sought by the United States against Stadium Apartments, Inc. and provided therein that the defendant would have a period of one year in which to redeem the mortgaged property after sale pursuant to Idaho Statute,

I.C. Sec. 11-402. (Rptr's. Tr. pp 23-24 and R. p 71) The date of that sale is December 12, 1967. (R. 82-85) Thus, the redemption period as provided in the decree of the District Court would have ended on December 11 or 12, 1958—approximately seven months prior to the hearing of this appeal. The record does not disclose how the United States can succeed to any greater interest in the property in question than it already has at the present time by pursuing this appeal. The period for redemption has expired and, according to the record, no event has occurred to defeat the United States from succeeding to complete ownership of the property. Matters not appearing in the record will not be considered by a Court of Appeals. Brooks v. Woods, 181 F.2d 716 (9th Cir. 1950); Rogers v. Union Pac. R. Co., 145 F.2d 119 (9th Cir. 1944). There is, therefore, no remedy which Appellant can obtain from this Court for the reason that Appellant already has what it is seeking to obtain.

Upon these facts the decision and language of the opinion in the Fink case are applicable and we urge that they provide a proper disposition of the case at bar.

This appeal should be dismissed as moot for several reasons. First, as already indicated, the period for redemption of this mortgage has passed and the record does not disclose how a determination by this court of the propriety of providing for a period of redemption could affect the interest of the United States in the property

in question. Thus, in the language of the Fink case, ". . . pending an appeal an event occurs which renders it impossible for the appellate court to grant any relief . . ."

Further, there is no actual controversy involved. Judgment in the district court was obtained by default without an appearance by the Defendant. Nor has the Defendant (Appellee) filed a brief nor indicated in any way that it will participate in this appeal; there is no party before this court claiming an interest adverse to that of the United States. In the language quoted in the Fink case, ". . . there must be an actual controversy; an appeal will not be entertained to determine moot questions, and it will be dismissed, therefore, if by an act of the parties or otherwise the circumstances have so changed that it is impossible or unnecessary for the appellate court to grant relief . . ."

The case of Bunn v. Werner, supra, is also analogous to the case at bar. It involved a suit to enjoin foreclosure of certain real estate under a deed of trust securing an usurious note and to reform the note and the deed of trust. On appeal from the District Court, which had denied a preliminary injunction against a foreclosure sale, the sale had already been made. In a per curiam opinion the United States Court of Appeals of the District of Columbia stated as follows:

> "When the appeal was argued counsel for each side said in open court that the foreclosure sale had taken place. It follows that this appeal must be dismissed as moot and the case remanded to the District Court for final hearing on the merits."

Just as the foreclosure sale made moot any appeal from a denial of an injunction against such a sale in the Bunn case, so in the case at bar, the expiration of the one-year redemption period provided in the decree of the court below has rendered this appeal moot.

CONCLUSION

Because of the somewhat peculiar circumstances of this case, in that only one adverse party is participating in an appeal upon a point of law which, according to the record, does not affect the rights of that party as determined by the trial court, it is altogether fitting that we as an amicus curiae urge that this court may properly refuse to deliver what amounts to an advisory opinion on an abstract point of law, in an ex parte appeal.

If, as the United States has urged, public policy demands that the issues it raises in this appeal be decided, this should be done in an adversary proceeding in which an actual controversy exists.

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CERTIFICATE OF MAILING

I hereby certify that I have on this 17th day of June, 1969, served the foregoing brief of Amicus Curiae upon the Appellant by placing two (2) true and correct copies of the same in the United States mail, postage prepaid, addressed to:

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